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release. The plaintiff replied by alleging fraud in obtaining the release, and the defendant demurred. *Held*, that the demurrer be overruled. *Plews* v. *Burrage*, 274 Fed. 881 (1st Circ.).

The rule is usually stated to be that an equitable replication that a release of the plaintiff's claim was obtained by fraudulent misrepresentations is good only if tender is made before trial. *Gould* v. *Cayuga County Nat. Bank*, 86 N. Y. 75. This view is supported by the weight of authority, and is followed by the Michigan court for the purely technical reason that a release, though voidable, is not avoided until tender is made. *Riggs* v. *Home Mutual Fire Prot. Ass'n*, 61 S. C. 448, 39 S. E. 614; *Heck* v. *Missouri Pac. Ry. Co.*, 147 Fed. 775 (Circ. Ct., D. Col.); *Harley* v. *Riverside Mills*, 129 Ga. 214, 58 S. E. 711. But where the consideration is money, as distinguished from chattels, this technical rule is not properly applicable. The plaintiff should be able to maintain an action on his original claim without tender, since the court may deduct the amount of the consideration from the damages. *St. Louis & S. F. R. Co.* v. *Richards*, 23 Okla. 256, 263, 102 Pac. 92, 95; *O'Brien* v. *Chicago, etc. Ry. Co.*, 89 Iowa, 644, 57 N. W. 425. The Federal case is right in result, but is based too broadly on the ground that this is an equitable replication, and no tender is necessary in equity. That rule is true only because equity protects the defendant by a conditional decree. *Thomas* v. *Beals*, 154 Mass. 51, 27 N. E. 1004. The Federal case being at law, tender would be necessary to protect the defendant if the consideration were other than money.

SALES — IMPLIED WARRANTY OF MERCHANTABILITY — INFRINGEMENT OF TRADE-MARK RIGHTS AS A BREACH. — The plaintiffs contracted to purchase from the defendants three thousand cans of condensed milk. When the milk arrived, one thousand of the cans had labels with the word "Nissly" upon them. This was an infringement of the trade-mark rights of the Nestlé Co. To avoid conflict with the latter, the plaintiffs were forced to strip off the labels and sell the milk unlabeled. They suffered loss, and now bring this action, alleging a breach of an implied warranty of merchantability. *Held*, that the plaintiffs recover. *Niblett* v. *Confectioners Materials Co.*, 125 L. T. R. 552 (C. A.).

It seems sometimes to be tacitly assumed in discussing the section of the Sale of Goods Act (§ 14–2) involved here, or the similar section in the American Act (§ 15–2), that a breach of the implied warranty of merchantable quality is occasioned only by a defect in the physical quality of the goods. See WILLISTON, SALES, § 243. But the Acts elsewhere define quality as including "state or condition." SALE OF GOODS ACT, 56 & 57 VICT., c. 71, § 62. UNIFORM SALES ACT, § 76. The emphatic word in the section under discussion is merchantable; and whatever renders the goods unmerchantable, whether it be strictly a defect of physical quality or not, is a breach of the warranty. The principal case, upon a unique set of facts, makes this point clear.

TRUSTS FOR CHARITABLE USES — *CY-PRÈS* — LACK OF GENERAL CHARITABLE INTENT SHOWN IN WILL. — Land was devised in trust for a school for poor children; but if the trust should not take effect or should be defeated or "the precise object . . . become prevented," then in trust for the settlor, his heirs and assigns. The funds available became so meager that the school was practically derelict. The court decided that the object of the trust had "become prevented." *Held*, that the property be applied *cy-près*. *In re Peel's Release*, [1921] 2 Ch. 218.

It is firmly settled, in theory, that the *cy-près* doctrine is founded on the intention of the testator; and when it appears that he had no general charitable intent, as is evident in the principal case, the court should not apply the property *cy-près*. *In re Rymer*, [1895] 1 Ch. 19; *In re White's Trusts*, 33 Ch. Div.

449; *Bowden* v. *Brown*, 200 Mass. 269, 86 N. E. 351. See 2 PERRY, TRUSTS, 6 ed., §§ 723, 726, 727, 728, note *a*; 1 JARMAN, WILLS, 6 Am. ed., star pp. 206–210; 33 HARV. L. REV. 598; 4 VA. L. REV. 224. The heirs should take, not under the express gift over (which after the perpetual gift to charity is void for remoteness), but under a resulting trust (which is not affected by the rule against remoteness). *Bowden* v. *Brown*, *supra*. See 2 PERRY, *op. cit.*, §§ 724, 726. See GRAY, RULE AGAINST PERPETUITIES, 2 ed., §§ 592, 593, 603 *e*, 603 *i*. The court seems to have lost sight of this possibility, and to have acted on a misapprehension of *In re Bowen*, [1893] 2 Ch. 491. The language of *In re Bowen* leaves us in doubt as to the ultimate disposition of the property in that case; but the decision, that an express gift over to third parties in a similar settlement is void, is entirely sound, and warrants no such result as the court reached here.

WAREHOUSEMEN — CONTRACT EXEMPTING FROM LIABILITY FOR NEGLIGENCE. — A lumber company, to whose rights the plaintiff stands subrogated, was notified by the defendant company that during an anticipated strike it would store no lumber except on condition that it be free from liability for loss from any cause. Lumber stored during the strike was burned during a fire caused by the negligence of one of the defendant's employees in operating a machine attached to an improperly constructed oil tank. *Held*, that the plaintiff cannot recover. *Northwestern Mutual Fire Ass'n* v. *Pacific Wharf and Storage Co.*, 200 Pac. 934 (Cal.).

By the weight of American authority, bailees engaged in businesses "affected with a public interest" may not contract for exemption from liability for negligence. *Railroad Co.* v. *Lockwood*, 17 Wall. (U. S.) 357. See *Gulf Compress Co.* v. *Harrington*, 90 Ark. 256, 119 S. W. 249; *Patterson* v. *Wenatchee Canning Co.*, 59 Wash. 556, 558, 110 Pac. 379, 380. *Contra*, *Cragin* v. *N. Y. C. Ry. Co.*, 51 N. Y. 61. On principle this seems sound. It is contrary to public policy that bailees whose services are almost indispensable to the public and who enjoy unusual advantages should be permitted to use the strength of their position to coerce the public into oppressive contracts. See *Railroad Co.* v. *Lockwood*, *supra*, at 379. See Hugh E. Willis, "The Right of Bailees to Contract against Liability for Negligence," 20 HARV. L. REV. 297. If the prevailing doctrine is accepted, the principal case cannot be upheld because of its exceptional circumstances. The existence of the strike might justify the defendant in discontinuing its business; but the defendant has not done so. While the business is continued, it is doubtful if the defendant can limit its liability even for the results of the strike, such as the negligence of inexperienced employees. The interests against such limitation still outweigh the interests of the defendant. *A fortiori* there is no ground for allowing a general limitation, covering a case where the negligence is, as here, entirely disconnected from the strike.

WILLS — CONSTRUCTION — "DIE WITHOUT ISSUE WHO SHALL REACH TWENTY-ONE." — A farm was devised to A for life, then to B absolutely, but if B should "die without issue who shall reach twenty-one," then to C. The Wills Act provides that words "which may import either a want or failure of issue of any person in his lifetime or at his death or an indefinite failure of his issue," shall be construed to mean a definite failure of issue unless a contrary intention shall appear by the will. (7 WILL. 4 & 1 VICT., c. 26, § 29.) *Held*, that the gift to C is void for remoteness. *In re Thomas*, [1921] 1 Ch. 306.

Where in a gift on failure of issue either a definite or an indefinite failure might be meant, the common law presumed that the testator intended an indefinite failure. *Candy* v. *Campbell*, 2 Cl. & F. 421. See HAWKINS, WILLS, 1 ed., 206. The Wills Act presumes a definite failure. See LEWIS, LAW OF